No. 15-145

In the
Supreme Court of the United States

HUSKY INTERNATIONAL ELECTRONICS, INC.,
Petitioner,
v.
DANIEL LEE RITZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Bankruptcy Code excepts from discharge "any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. §523(a)(2)(A). The question presented is whether this provision applies when the debtor concededly made no misrepresentation that induced the putative creditor to turn over any money, property, services, or credit, and instead is alleged only to have participated in a transaction that aided a third party in evading that party's preexisting debts to that creditor.

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INTRODUCTION

This case concerns the Bankruptcy Code's exception from discharge for "any debt ... for money, property, services, or ... credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. §523(a)(2)(A). That exception is not, as respondent claims, a catchall for any debt attributable to any conduct that conceivably might be described as "intended to defraud." Instead, the section 523(a)(2)(A) exception is directed at a specific kind of debt: a debt for money, property, services, or credit with which the debtor fraudulently induced the creditor to part. In other words, the exception is directed only at debts that are the product of a misrepresentation that induced the creditor to part with whatever it is that gave rise to the debt.

That is clear not only from the statute's explicit and repeated references to false words or acts, but also from its application to debts for things "obtained by" the conduct that it enumerates. As this Court held in *Field v. Mans*, "some degree of *reliance* is required to satisfy the element of causation inherent in the phrase 'obtained by,'" 516 U.S. 59, 66 (1995) (emphasis added)—a phrase found in none of the code's other exceptions. And a creditor cannot establish reliance without first establishing the misrepresentation that induced it. The statute itself thus confirms that section 523(a)(2)(A) incorporates the ordinary understanding of common-law fraud: a knowingly false or misleading word or act used to induce the victim's detrimental reliance.

Congress' inclusion of the phrase "actual fraud" in section 523(a)(2)(A) does not do away with those

essential elements. As petitioner concedes, the term "actual fraud" "has nothing to do with whether the fraud involves a misrepresentation." Pet'r.Br.15. Instead, it "refers to the perpetrator's *mindset*"—*i.e.*, whether the perpetrator *intended* his conduct to injure the victim. Pet'r.Br.19 (emphasis added). The cases on which petitioner relies use the term in that very sense, treating "actual fraud" as a shorthand for scienter, not as a particular type of conduct.

That is precisely how Congress used the term in section 523(a)(2)(A): to confirm that the exception applies only to debts for things induced by intentional, not "constructive" or "implied," fraud. The "actual fraud" language thus does not expand section 523(a)(2)(A) at all; instead, it serves to narrow the exception, by requiring the creditor to prove that the debtor made the misrepresentation with actual intent to induce the creditor to part with its money, property, services, or credit. Here, it is conceded that respondent did not make any misrepresentation that induced petitioner to part with anything. In fact, it is undisputed that respondent obtained nothing from petitioner at all. The courts below thus correctly concluded that petitioner failed to prove the existence of "any debt ... for money, property, services, or ... credit ... obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. §523(a)(2)(A).

That does not mean, as petitioner suggests, that the Bankruptcy Code contains some sort of "carve out" for the type of intentional wrongdoing alleged (albeit not proven) here. In fact, conduct that injures a creditor, but not through a misrepresentation that

induced it to part with money, property, services, or credit, is dealt with in several provisions of the code—including other exceptions from discharge. Petitioner invoked one of those exceptions (the exception for "willful and malicious injury" to the creditor) in this very case. Its efforts did not fail because the courts below found that exception inapplicable as a matter of law. They failed because the courts below found that petitioner failed to prove that respondent engaged in any misconduct *intended* to injure petitioner. That not only means that petitioner cannot prevail even under its own reading of section 523(a)(2)(A), but also confirms that the Bankruptcy Code already has ample means of dealing with debts attributable to so-called "fraudulent conveyances." Petitioner's attempt to add section 523(a)(2)(A) to that list is nothing more than an ill-concealed effort to rescue itself from the consequences of having failed to prove its case.

STATEMENT OF THE CASE

A. Statutory Background

1. "The Bankruptcy Code provides diverse courses overburdened debtors may pursue to gain discharge of their financial obligations, and thereby a 'fresh start.'" *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015). For an individual debtor, the choice is typically between Chapter 7 and Chapter 13. A Chapter 7 bankruptcy "allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets." *Id.* Although the debtor's debts are discharged entirely, subject to certain specified exceptions, the debtor's pre-petition assets are lost entirely as well. Chapter 13, on the other hand, is a "wholly voluntary alternative to Chapter 7" that

"allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three- to-five year period." *Id.* Unlike under a Chapter 7 liquidation, "[p]ayments under a Chapter 13 plan are usually made from a debtor's 'future earnings or other future income.'" *Id.* (quoting 11 U.S.C. §1322(a)(1)). While Chapter 13 does not demand that a debtor give up all of his pre-petition assets, it also does not provide the same immediate "clean break" as Chapter 7. Discharge instead comes only after the debtor has completed a plan for paying off his debts.

The Bankruptcy Code has long imposed certain bars to discharge, some of which are absolute, and some of which apply only to except particular debts from discharge. As for the former, the code categorically denies discharge to a debtor who uses fraudulent transfers or other acts to conceal his assets and prevent his creditors from collecting on their debts. Specifically, it denies discharge to any debtor who,

> with intent to hinder, delay, or defraud a creditor or ... the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition[.]

11 U.S.C. §727(a)(2).

The code also empowers the trustee of the estate to avoid transfers of the debtor's assets under certain specified circumstances. *Id.* §548(a)(1). Any transfer made "with actual intent to hinder, delay, or defraud a creditor" within two years of filing (rather than one-year requirement for section 727(a)(2)'s absolute bar) may be avoided, *id.* §548(a)(1)(A), and transfers during that timeframe also be may avoided without regard to the debtor's intent if they were made for "less than a reasonably equivalent value" and one of four other conditions is satisfied, *id.* §548(a)(1)(B). Through these provisions, Congress has spoken directly to situations in which a debtor attempts to use the Bankruptcy Code as a vehicle for evading his debts: In such situations, the transfers can be avoided and, in the most egregious cases, the debtor can be denied a discharge of all debts.

As to debtors who engaged in other forms of wrongdoing before declaring bankruptcy, Congress was not nearly so harsh. Instead of denying discharge entirely, the code excepts from discharge debts arising out of certain enumerated acts or circumstances. Accordingly, Congress still provides a "fresh start" to debtors who have committed acts such as "embezzlement[] or larceny," or "willful and malicious injury ... to another," *id.* §523(a)(4), (6); their fresh start just may not be quite as complete. Consistent with the ultimate goal of giving the debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," this Court has long held that these debt-specific exceptions to discharge must be construed narrowly. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *see also, e.g., Bullock v.*

BankChampaign, N.A., 133 S. Ct. 1754, 1760 (2013); *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

2. This case concerns the exception to discharge found in section 523(a)(2)(A), which excepts "any debt—(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. §523(a)(2)(A). Section 523(a)(2)(A) has its origins in the 1867 bankruptcy statute, which excepted from discharge any "debt created by the fraud or embezzlement of the bankrupt." Act of Mar. 2, 1867, ch.76, §33, 14 Stat. 517, 533 ("1867 Act"). Invoking the "liberal spirit which pervades the entire bankruptcy system," this Court early on held that "the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." *Neal v. Clark*, 95 U.S. 704, 707, 709 (1877). In other words, the Court held that the exception referred only to "actual fraud," not "constructive fraud." *Id.*

Although the term "actual fraud" dates back to *Neal* and cases before it, Congress did not add that term to the Bankruptcy Code for another century. Instead, in 1898, Congress narrowed the fraud exception by confining it to debts for "*judgments* in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and

malicious injuries to the person or property of another." Act of July 1, 1898, ch.541, §17a(2), 30 Stat. 544, 550 ("1898 Act") (emphasis added). As this Court explained, that revision meant that "claims grounded in fraud will not be exempted unless reduced to judgment." *Bullis v. O'Beirne*, 195 U.S. 606, 619 (1904). In the 1898 Act, Congress also included a separate subsection excepting from discharge debts "created by [the debtor's] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." 1898 Act §17a(4), 30 Stat. at 550-51.

In 1903, Congress removed the term "fraud" from section 17a(2) entirely and revised the provision to except "liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." Act of Feb. 5, 1903, ch.487, §5, 32 Stat. 797, 798 ("1903 Act"). Congress retained the separate exception for "debts created by [a debtor's] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." *Id.* The accompanying House Judiciary Committee report offered no explanation for the deletion of "fraud" from subsection (2) of section 17a. *See* H.R. Rep. No. 57-1698, at 6 (1902). The report made clear, however, that the committee considered the phrase "false pretenses or false representations" coterminous with the "created by fraud" concept reflected in the 1867 Act and discussed in *Neal*: According to the report, the change from "judgment" to "liabilities" would ensure that "claims *created by fraud* but not reduced to judgment" would be excepted from discharge. *Id.* (emphasis added).

Consistent with that understanding, this Court continued to treat section 17a(2) as excepting from discharge debts "obtained by fraud." *Gleason*, 236 U.S. at 562. Because section 17a(2) applied only to "liabilities for obtaining *property* by false pretenses or false representations," however, the Court concluded that it could not reach debts for "liabilities incurred for *services* obtained by fraud." *Id.* (emphasis added). Congress subsequently amended section 17a(2) to add the term "money." *See* Chandler Act, Pub. L. No. 75-969, 52 Stat. 840, 851 (1938). For the next 40 years, these exceptions remained effectively unchanged, denying discharge of any "liabilities for obtaining money or property by false pretenses or false representations, or ... liabilities for willful and malicious injuries to the person or property of another." 11 U.S.C. §35(a) (1976).

3. When Congress enacted the modern Bankruptcy Code in 1978, it continued to deal with fraud in multiple exceptions from discharge. In what is now section 523(a)(2), Congress excepted from discharge any debt "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Act of Nov. 6, 1978, Pub. L. No. 95-598, §101, 92 Stat. 2549, 2590 ("1978 Act") (codified at 11 U.S.C. §523(a)(2)(A)). In the same provision, Congress also excepted any debt "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by" certain "materially false" writings that the debtor "made or published with intent to deceive," and "on which the creditor to whom the debtor is liable for such money,

property, services, or credit reasonably relied." *Id.* (codified at 11 U.S.C. §523(a)(2)(B)). In a separate provision of section 523(a), Congress continued to except any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." *Id.* §101, 92 Stat. at 2591 (codified at 11 U.S.C. §523(a)(4)). Congress also retained and moved to a separate provision the exception for any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.* (codified at 11 U.S.C. §523(a)(6)).

In 1984, Congress amended the fraud exception now found in section 523(a)(2) to add a new subsection (C) providing that, "for purposes of subparagraph (A), ... debts ... for luxury goods or services incurred by an individual debtor on or within forty days" or "cash advances ... obtained by an individual debtor on or within twenty days" of a bankruptcy filing are "presumed to be nondischargeable." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §307(a), 98 Stat. 333, 353 ("1984 Act"). In conjunction with these changes, Congress also made a "stylistic" change to section 523(a)(2)'s "obtaining" language. S. Rep. No. 98-65, at 80 (1983). It removed the word "obtaining" and added a materially identical qualifier limiting section 523(a)(2)'s application to debts "for money ..., to the extent obtained by" the conduct enumerated in subparagraphs (A) and (B). 1984 Act §454(a)(1)(B), 98 Stat. at 376.

The most relevant parts of section 523(a)(2) thus currently read:

> (a) A discharge ... does not discharge an individual debtor from any debt—
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive[.]

11 U.S.C. §523(a)(2)(A)-(B).

Section 523(a)(4) continues to except from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." *Id.* §523(a)(4). And section 523(a)(6) continues to except any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.* §523(a)(6).

4. In the 1978 version of the Bankruptcy Code, each of those exceptions applied in Chapter 7 proceedings, but not in Chapter 13 proceedings. In 2005, however, Congress revised the code to extend some (but not all) of the Chapter 7 exceptions to Chapter 13 cases. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, §314, 119 Stat. 23, 88 (codified at 11 U.S.C. §1328(a)(2)). In particular, Congress applied section 523(a)(2) and 523(a)(4) to Chapter 13 cases, but not section 523(a)(6). *See* 11 U.S.C. §1328(a)(2). Debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" therefore can be excepted from a Chapter 7 discharge, but not from a Chapter 13 discharge.

B. Proceedings Below

1. Factual Background

This case arises out of a Chapter 7 bankruptcy filed by respondent Daniel Ritz, an individual debtor. Before filing for bankruptcy, respondent was a director and partial owner of Chrysalis Manufacturing Corporation ("Chrysalis"), a company that manufactured circuit boards. Pet.App.38a, 80a-81a. To perform that task, Chrysalis obtained parts from various different suppliers, including petitioner Husky International Electronics. From 2003 through 2007, petitioner sold and delivered electronic device components to Chrysalis pursuant to a written contract. Pet.App.80a. Although respondent, as a director and partial owner, maintained financial control over Chrysalis, Pet.App.2a, 80a, he had no involvement in Chrysalis's negotiation of, entry into,

or execution of its contract with petitioner for the supply of electronic device components. Pet.App.83a; JA40. It is undisputed that respondent's first and only contact with petitioner was a brief telephone conversation that took place more than four years into the contractual relationship, after petitioner ceased shipping goods to Chrysalis. Pet.App.80a, 83a; JA39-40.

Over time, Chrysalis failed to pay for some of the goods delivered to it by petitioner, resulting in an unsecured debt of $163,999.38. Pet.App.80a-83a. While some or all of that debt was outstanding, respondent caused Chrysalis to transfer some of its funds to other entities that he owned or controlled. Pet.App.81a-82a. Respondent maintains that there was nothing nefarious about these transactions. He contends that the funds flowing out of Chrysalis were repayments of loans made to Chrysalis in the course of ordinary business by the other entities that he controlled. *See infra* pp.14-15.

In June 2007, petitioner filed a lawsuit in Texas state court against Chrysalis, respondent, and several of the entities controlled by respondent that had provided working capital loans to Chrysalis, alleging various state law claims relating to Chrysalis's unpaid debt. *See Husky Int'l Elecs., Inc. v. Chrysalis Mfg. Corp.*, No. 2007-39059 (280th Dist. Ct., Harris Cty., Tex.). In June 2008, while that state court case was still pending, Chrysalis filed for Chapter 7 bankruptcy. *See In re Chrysalis Mfg. Corp.*, No. 08-33793 (Bankr. S.D. Tex. June 12, 2008). The trustee of the Chrysalis bankruptcy estate did not attempt to use section 548(a) to avoid any of the transfers that

respondent caused Chrysalis to make during the two years before its bankruptcy filing. In February 2009, the trustee issued a no asset report. No assets were administered, and the case was closed that same month.

In May 2009, while its state court case was still pending, petitioner sued respondent in federal district court seeking to hold him personally liable for Chrysalis's breach of contract pursuant to section 21.223(b) of the Texas Business Organization Code, which permits piercing the corporate veil if a shareholder used a corporation to "perpetrate an actual fraud on" a creditor "primarily for the personal benefit of the" shareholder. *See* Compl. 4, *Husky Int'l Elecs., Inc. v. Ritz*, No. 4:09-cv-01532 (S.D. Tex. May 20, 2009) (Dkt. 1). According to petitioner, by causing Chrysalis to transfer assets to entities that he owned or controlled, respondent used Chrysalis to perpetrate an "actual fraud" against petitioner for his benefit. *Id.* at 4. Petitioner further alleged that respondent himself committed common-law fraud by making "representations to Husky" that "creat[ed] the impression that Husky would be paid for its goods while instead dissipating and transferring" Chrysalis's assets. *Id.* at 5. Petitioner alleged that respondent "knew the representations were false" or recklessly made and intended petitioner to rely on them. *Id.* Finally, petitioner also alleged claims for breach of fiduciary duty and recovery in quantum meruit. *Id.* at 5-6. Shortly after filing its federal suit, petitioner dismissed its state court case without prejudice.

In December 2009, before any aspect of the federal district court litigation was resolved, respondent filed a Chapter 7 bankruptcy petition. *See* Pet., *In re Ritz*, No. 09-39895 (Bankr. S.D. Tex. Dec. 31, 2009). An automatic stay of the district court litigation ensued. In March 2010, petitioner initiated this adversary proceeding in Bankruptcy Court, seeking to hold respondent responsible for paying Chrysalis's debt under Texas state law and bar him from discharging that obligation through his bankruptcy proceeding. Petitioner once again alleged that respondent is personally liable for Chrysalis's breach of contract pursuant to section 21.223(b) of the Texas Business Organization Code, and that he committed common-law fraud by making false representations to petitioner to induce it to sell the goods to Chrysalis. JA94. Petitioner claimed that the debt respondent purportedly owed petitioner for these state law claims should be excepted from discharge under the "actual fraud" prong of section 523(a)(2)(A), the section 523(a)(4) exception "for fraud or defalcation while acting in a fiduciary capacity," and the section 523(a)(6) exception "for willful or malicious injuries to the person or property of another." *See* JA96-97.

2. The Bankruptcy Court's Decision

The Bankruptcy Court held a bench trial, during which respondent adduced substantial evidence that the transfers were not an effort to drain a defunct Chrysalis of its assets in anticipation of a bankruptcy filing. On the contrary, the evidence showed that Chrysalis was a going concern from January 2006 until it ceased operations in May 2007. Throughout that timeframe, Chrysalis continued production at its

California manufacturing facility, paid its employees, purchased and paid for parts from its suppliers, and earned revenue. *See* Pet.App.57a, 61a. The evidence also showed that, during the same timeframe when respondent was authorizing the transfers of funds out of Chrysalis, several entities controlled by respondent were making transfers into Chrysalis on a continuing, short-term basis to fund its ongoing business operations. *See* Pet.App.50a, 55a, 62a; JA56-61, 67. Between January 2006 and May 2007, more than $2.8 million were transferred to Chrysalis, which exceeded Chrysalis's outbound transfers by more than $900,000. *See, e.g.*, JA56-60, 85-87; Pet.App.55a, 57a, 62a.

The Bankruptcy Court ultimately found that respondent caused Chrysalis to make transfers for "less than reasonably equivalent value." Pet.App.81. But it rejected each of petitioner's attempts to demonstrate that respondent's conduct gave rise to a debt excepted from discharge. Pet.App.79a. The court first held that respondent was not liable for Chrysalis's debt as a matter of state law because he did not use Chrysalis to "perpetrate an actual fraud" on petitioner within the meaning of section 21.223(b) of the Texas Business Organization Code. Pet.App.91a-92a. Reviewing state and federal court decisions interpreting section 21.223(b), the court concluded that "actual fraud" under that provision requires proof, *inter alia*, that the alleged fraudster made a material misrepresentation to the purported victim. Pet.App.92a.

Although petitioner had alleged in its complaint that respondent made material misrepresentations,

JA94, the Bankruptcy Court found that "[t]he record is wholly devoid of any such representation," Pet.App.92a. And with good reason, as petitioner's CEO openly conceded at trial that respondent never made *any* representations to his company—indeed, never even spoke with him until after petitioner had already made its last shipment of goods to Chrysalis. JA40. The court further concluded that even if respondent could be held liable for Chrysalis's debt pursuant to section 21.223(b), the ensuing debt to petitioner would not be excepted from discharge under section 523(a)(2)(A) of the Bankruptcy Code because the "actual fraud" prong of that provision likewise requires the debtor to have made a misrepresentation to the creditor. Pet.App.92a.

The court also rejected petitioner's remaining discharge exception claims. It held that any "fraud" respondent may have committed would not be excepted from discharge under section 523(a)(4) because respondent "owed no fiduciary duty to" petitioner. Pet.App.95a. And it found the record "wholly devoid of any proof that [respondent] willfully and maliciously injured Husky or Husky's property." Pet.App.96a. In reaching that conclusion, the court noted that "no exhibits were introduced, no testimony was adduced, and no briefing was done relating to §523(a)(6)"; instead, petitioner made only "a glancing reference to" that provision in its complaint. Pet.App.96a.

3. The District Court's Decision

Petitioner appealed, and the District Court affirmed. Although the court disagreed with the Bankruptcy Court's conclusion that a

misrepresentation is an element of "actual fraud" under section 21.223(b) of the Texas Code, it agreed with the Bankruptcy Court that a misrepresentation is an element of a claim under section 523(a)(2)(A) of the Bankruptcy Code. Pet.App.72a. Because it was undisputed at that point that respondent made no misrepresentation to petitioner, the court agreed that any debt respondent may owe to petitioner is not excepted from discharge under section 523(a)(2)(A). Pet.App.73a. The court also agreed with the Bankruptcy Court that petitioner failed to establish a debt excepted from discharge under section 523(a)(6), as "'[t]he record is wholly devoid of any proof" that respondent "willfully and maliciously" injured petitioner or its property. Pet.App.75a (quoting Pet.App.96a). Respondent did not appeal the Bankruptcy Court's ruling on its section 523(a)(4) claim.

4. The Court of Appeals' Decision

The Fifth Circuit unanimously affirmed. As to section 523(a)(2)(A), the court agreed with both courts below that "a representation is a necessary prerequisite for a showing of 'actual fraud' under Section 523(a)(2)(A)." Pet.App.17a. The court rejected the Seventh Circuit's contrary conclusion in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), as "in tension with" this Court's cases and common-law sources that "indicate that a representation is a necessary prerequisite" to a fraud claim. Pet.App.9a, 11a.[1] The

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[1] Having rejected petitioner's section 523(a)(2)(A) claim as a legal matter, the Court of Appeals did not address the question of respondent's liability under Texas law or petitioner's challenges to the lower courts' factual findings. Pet.App.6a-7a.

Fifth Circuit also affirmed the District Court's holding that petitioner failed to meet its "burden to prove" that respondent owed any debt for "willfully and maliciously" injuring petitioner or its property, finding "scant evidence in the record indicating either that Ritz made these transfers with the intent to harm Husky, or that harm to Husky was substantially certain due to Ritz's actions." Pet.App.18a.

SUMMARY OF ARGUMENT

Section 523(a)(2)(A) of the Bankruptcy Code is directed at a specific kind of debt: a "debt ... for money, property, services, or ... credit ... obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. §523(a)(2)(A). In other words, by its terms, the statute is directed only at a debt for money, property, services, or credit with which a debtor fraudulently induced a creditor to part. To state the obvious, a debtor cannot fraudulently induce a creditor to part with anything without employing some false or misleading word or deed to do the inducing. The statutory text reinforces that common sense point, speaking explicitly and repeatedly of conduct involving false or misleading statements or actions on which the creditor relied. Accordingly, as this Court recognized in *Field v. Mans*, section 523(a)(2)(A) applies only when a debtor has made some reliance-inducing misrepresentation.

Congress did not do away with that settled understanding by adding the term "actual fraud" to section 523(a)(2)(A). "Actual fraud" is not a term used to denote any particular form of conduct—let alone a form of conduct necessarily broader than fraudulent misrepresentation. Instead, as petitioner itself

reiterates repeatedly, that term is used to denote the *intent* with which the perpetrator must have acted. For example, a false representation may be actionable even if negligently or innocently made. But if a jurisdiction requires "actual fraud," then the representation must be knowingly false, and made with intent to induce the victim's reliance. That is exactly the sense in which Congress used the term "actual fraud" in section 523(a)(2)(A): to confirm that a misrepresentation must be *intended* to injure the creditor to give rise to a debt falling within the exception. The statute's "obtained by" requirement commands that conclusion, and the legislative history reinforces it, explaining that the 1978 revisions to the fraud exception were simply designed to confirm that the provision applies only to intentional, not "constructive," fraud.

To be sure, adding the phrase "*or* actual fraud" to the statute may not have been the most precise way of going about that task. But petitioner's reading of the statute produces far more serious textual concerns than an ill-advised use of the word "or." For instance, if "actual fraud" is a phrase of expansion, not limitation, then under petitioner's reading, it renders "false pretenses" and "false representation" utterly redundant. Moreover, if the term "actual fraud" covers conduct without regard to whether it induced *the creditor* to part with something (as petitioner insists it does), then the phrase "for money, property, services, or ... credit, to the extent obtained by" has no independent force either. Finally, if section 523(a)(2)(A) already covers the universe of debts having any connection to any conduct that conceivably might be described as "intended to defraud," then

there was no need for Congress to refer to "fraud" expressly in several other exceptions found in section 523(a). As between a reading that gives substantive meaning to every word in section 523(a)(2)(A) save perhaps "or," and one that deprives large swaths of statutory text of any force, the choice should be easy.

Petitioner's extended discussion of fraudulent conveyance law does not suggest otherwise. Whether fraudulent conveyances are a form of common-law fraud is largely irrelevant, as debts attributable to fraudulent conveyances do not fall within section 523(a)(2)(A) because they are not debts for anything "obtained by" the debtor from the creditor. Moreover, the cases on which petitioner relies only reinforce the conclusion that "actual fraud" is a term of intent, as they use that term to describe the scienter sometimes required to invoke a fraudulent conveyance law, not to render fraudulent conveyances a subset of some distinct category of conduct known as "actual fraud." For that very reason, commentators have noted that use of the term "fraud" in the fraudulent conveyance context is a misnomer, as fraudulent conveyances do not require "fraud" in the ordinary sense (or in the sense that section 523(a)(2)(A) requires)—*i.e.*, they do not require a reliance-inducing misrepresentation.

None of that means that a creditor injured by a fraudulent conveyance is without recourse. There are many provisions of the Bankruptcy Code that deal with fraudulent conveyances, whether explicitly or implicitly. Petitioner invoked one of those provisions—section 523(a)(6)'s exception for debts for willful and malicious injury to a creditor—in this case. Its efforts failed not because that exception was too

narrow to reach the conduct alleged, but because each court below concluded that petitioner failed to adduce any proof that respondent made the transfers in question with intent to harm petitioner. There is thus no need to accept petitioner's boundless conception of "actual fraud," or to do away with section 523(a)(2)'s "obtained by" requirement, to ensure that creditors have adequate remedies when debtors knowingly participate in transactions intended to hinder, delay, or defraud a creditor's ability to collect on a debt. Petitioner's inability to establish a debt excepted from discharge is a product not of some deficiency in the code, but of petitioner's simple failure to prove its case.

ARGUMENT

I. Section 523(a)(2)(A) Applies Only When The Debtor Made A Misrepresentation On Which The Creditor Relied.

Section 523(a)(2)(A) excepts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. §523(a)(2)(A). That provision is "not [an] innovation[] in [its] most recent codification," but rather "had obvious antecedents in" earlier bankruptcy laws. *Field*, 516 U.S. at 64. At times, the provision applied only to debts "created by ... fraud," 1867 Act §33, 14 Stat. at 533; at other times, it applied only to "liabilities for obtaining money or property by false pretenses or false representations," Chandler Act §17a(2), 52 Stat. at 851; *see also* 1898 Act §17a(2), 30 Stat at 550; 1903 Act §5, 32 Stat. at 798. But at all times, it has been directed at the same basic concept: a "debt [that] follows a transfer of value

or extension of credit induced by falsity or fraud." *Field*, 516 U.S. at 66; *see also, e.g.*, *Gleason*, 236 U.S. at 562.

To state the obvious, a transfer of value or extension of credit can be "induced by falsity or fraud" only if the debtor employs some false word or deed that induces the creditor to act. In other words, it can be induced only by a misrepresentation. To be sure, the concept of "misrepresentation" is a broad one, encompassing "not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth." Restatement (Second) of Torts §525 cmt. b (1977); *see also, e.g.*, William L. Prosser, *Handbook of the Law of Torts* §106, at 694 (4th ed. 1971) (a "representation ... usually consists, of course, of oral or written words; but it is not necessarily so limited"). But as a matter of common sense, the irreducible minimum of a claim that a debtor used fraud to induce a creditor to part with something is some false or misleading word or deed that does the inducing. Accordingly, this Court concluded in *Field* that, to establish a debt excepted from discharge under section 523(a)(2)(A), a creditor must prove the elements of the common-law tort of fraudulent misrepresentation—*i.e.*, a false or misleading act or deed on which the creditor justifiably relied to its detriment. *Field*, 516 U.S. at 70.

That is hardly a novel proposition. This Court has recognized repeatedly, both in the bankruptcy context and elsewhere, that "'[f]raud' typically requires a false statement or omission" on which the victim relied. *Bullock*, 133 S. Ct. at 1760; *see also, e.g.*, *Neder v.*

United States, 527 U.S. 1, 22 (1999) ("the well-settled meaning of 'fraud' require[s] a misrepresentation or concealment of material fact" (emphasis omitted)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996) ("actionable fraud requires a material misrepresentation or omission" (emphasis omitted)). As reflected in myriad definitions over the years, that is what distinguishes fraud from other intentional torts: It injures the victim by inducing reliance. *See, e.g.*, Restatement (Second) of Torts §871 cmt. e (1979) ("[t]he actor's conduct is fraudulent if he intentionally causes another to act or refrain from acting by means of intentionally false or misleading conduct or by his intentional concealment of facts"); *Black's Law Dictionary* (10th ed. 2014) ("fraud: A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment."); Restatement (Third) of Torts: Liability for Economic Harm Tentative Draft No. 2, §9 Reporters' note (2014) (defining "fraud" as "mak[ing] a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting").

Indeed, even the sources of the broader formulations of "fraud" on which petitioner relies reinforce the conclusion that common-law fraud requires a reliance-inducing misrepresentation. For example, petitioner parrots the Seventh Circuit's assertion in *McClellan* that "fraud is a 'generic term' that 'includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.'" Pet'r.Br.23 (quoting *McClellan*, 217 F.3d at 893). But what the source on which Judge Posner relied for that claim says in full is that fraud is "a generic term,

which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another *by false suggestions or by the suppression of truth.*" *Stapleton v. Holt*, 250 P.2d 451, 453-54 (Okla. 1952) (emphasis added). And the Oklahoma Supreme Court affirmed the verdict on the defendant's fraud counterclaim in that breach of contract case only because the court found the evidence sufficient to support the defendant's allegations that the plaintiff made a "representation ... known by plaintiff to be false ... with the intention that it should be acted upon by defendant" to his detriment. *Id.* at 454.[2] Accordingly, petitioner's own cases reiterate that common-law fraud requires a misrepresentation on which the defendant relied to its detriment.

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[2] The same is true of other cases on which petitioner relies. For instance, although *Chien v. Chen*, 759 S.W.2d 484 (Tex. App. 1988), may have described fraud in broad terms, it found sufficient *evidence* of fraud because the defendant made a series of "false representation" to "induce[]" the victim to "sell the property" at "less than market value." *Id.* at 496; *see also Bullis*, 195 U.S. at 620-21 (finding "fraud" because "[t]he facts charged and found showed false and fraudulent representations as to the character of the property which was to be the security of those who should purchase the bonds, and resulted in depriving them wrongfully of valuable rights"). The other cases petitioner cites either deal with the use of "fraud" as an *intent* element, *see, e.g.*, *Wallace v. Wallace*, 291 S.E.2d 386, 388 (W. Va. 1982); *State v. Scofield*, 438 P.2d 776, 780-81 (Ariz. Ct. App. 1968), or with fraud while acting in fiduciary capacity, which is dealt with in a separate exception from discharge, *see, e.g.*, *Seeburg v. Norville*, 85 So. 505 (Ala. 1920); *Smith v. Harrison*, 2 Heisk. 230, 243 (Tenn. 1870).

The text of section 523(a)(2)(A) confirms that the exception applies only to that ordinary, common-law understanding of fraud. Most of the act's provisions refer explicitly to conduct that, by its terms, requires a misrepresentation. For instance, false pretenses has as its elements, *inter alia*, "a false representation ... which causes the victim ... to pass title to ... his property to the wrongdoer." Wayne R. LaFave, *Substantive Criminal Law* §19.7 (2d ed.). False representation has as its elements, *inter alia*, a "misrepresentation," "in reliance upon" which "the plaintiff has parted with money, or property of value." Prosser, §105, at 684; *see also id.* §107, at 699. And subparagraph (B) deals with debts for transfers induced by "a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. §523(a)(2)(B). These provisions underscore that section 523(a)(2) is directed at a specific kind of debt: a debt that "follows a transfer of value or extension of credit induced by falsity or fraud," or "by a materially false and intentionally deceptive written statement of financial condition." *Field*, 516 U.S. at 66. And that kind of debt requires a misrepresentation.

To the extent there were any doubt on that score, section 523(a)(2)'s prefatory clause eliminates it. Section 523(a)(2) applies only to a debt "for money, property, services, or an extension, renewal, or refinancing of credit, *to the extent obtained by*" the conduct that its subparagraphs enumerate. 11 U.S.C. §523(a)(2)(A) (emphasis added). As this Court had little trouble recognizing in *Field*, "some degree of *reliance* is required to satisfy the element of causation inherent in the phrase 'obtained by.'" 516 U.S. at 66 (emphasis added). By confining section 523(a)(2)(A) to

debts "for" things "obtained by false pretenses, a false representation, or actual fraud," or a materially false written statement regarding financial condition, Congress made doubly clear that the exception applies only to conduct that induced the creditor to part with whatever it is that gave rise to the debt. Accordingly, read as a whole, the statutory text confirms that the only fraud subparagraph (A) reaches is fraud involving a misrepresentation on which the creditor relied to its detriment.

The leading bankruptcy treatise reflects the same understanding. Like the Oklahoma Supreme Court in *Stapleton*, Collier describes "fraud" in broad terms as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." 4 *Collier on Bankruptcy* ¶523.08[1][e] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015) ("*Collier*"). But the treatise goes on to reiterate that, "[t]o sustain a prima facie case of fraud, a plaintiff under section 523(a)(2) must establish ... that the debtor made [a knowingly false] representation" on which "the plaintiff justifiably relied," and that "the plaintiff sustained a loss or damage as the proximate consequence of the representation having been." *Id.* Collier thus recognizes what the text, structure, and history of the statute make clear: Section 523(a)(2)(A) requires a misrepresentation that induced the creditor to part with its money, property, services, or credit.

II. The Term "Actual Fraud" Does Not Eliminate The Need To Prove A Reliance-Inducing Misrepresentation.

According to petitioner, section 523(a)(2)(A) is not confined to debts that involve a reliance-inducing representation. Nor is it confined to debts arising out of frauds through which the debtor induced the creditor to part with something of value. Instead, in petitioner's view, the exception applies to any debt traceable to any conduct that conceivably might be described as "intended to defraud." In petitioner's view, that is the only way to explain Congress' inclusion of the term "actual fraud" in section 523(a)(2)(A). *See* Pet'rBr.33. That reading suffers from any number of problems, not the least of which are its utter incompatibility with the statute's "obtained by" clause and the massive superfluity that it would produce. But it also rests on a fundamental misconception of the term "actual fraud," which is a term used to impose an *intent* requirement, not to define what *conduct* qualifies as "fraud."

A. "Actual Fraud" Is a Term Used to Describe Intent, Not a Particular Form of Conduct.

Petitioner's textual argument rests principally on the notion that "actual fraud" must cover a broader swath of conduct than misrepresentation in order to avoid rendering the term redundant of "false pretenses" and "false representation." *See* Pet'r.Br.37-38. But there is no need to strain to ensure that the term "actual fraud" causes section 523(a)(2)(A) to "cover something that the discharge bar did not cover before," Pet'r.Br.36, because Congress included that

term to *narrow* the scope of the exception, not to expand it. As petitioner itself argues repeatedly, at common law, the term "actual fraud" "has nothing to do with whether the fraud involves a misrepresentation." Pet'r.Br.15. Instead, "[t]he modifier 'actual' refers to the perpetrator's *mindset*—i.e., intentionally fraudulent conduct, as distinct from fraud implied in law." Pet'r.Br.9 (emphasis added). That is precisely the manner in which Congress used the term "actual fraud" in section 523(a)(2)(A): to confine the exception to intentional, not "implied" or "constructive," fraud.

The legislative history confirms as much. As the 1978 Act's sponsor explained, section 523(a)(2)(A) was not designed to "close[]" some unidentified "gap" in the long-standing fraud exception. Pet'r.Br.5.[3] Instead,

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[3] The sum total of petitioner's support for its "gap-filling" theory is a single floor statement from discussion of the 1903 amendments in which one Representative hypothesized that "there are many other frauds, of course, besides false pretenses and false representations," then observed that it "must ultimately be left to the courts" to decide whether the 1903 version of the code covered whatever else he was envisioning. 36 Cong. Rec. 1375 (Jan. 28, 1903) (statement of Rep. Mann). Petitioner identifies no further mention—whether in the 1978 legislative history or otherwise—of any concern that the pre-1978 term "false pretenses or false representation" was too narrow to cover the types of fraud Congress intended the exception to cover. Moreover, the Judiciary Committee report from the 1903 Act reveals that its amendments to section 17a were designed to close a gap, not create one. Whereas the 1898 Act version excepted only debts for "judgments in actions for fraud," 1898 Act §17a, "[t]he substitution of 'liabilities' for 'judgments in actions' ma[de] the clause broader" by ensuring that "claims created by fraud" would be excepted regardless of whether they were "reduced to judgment," H.R. Rep. No. 57-1698, at 6.

its was designed to "codify current case law, *e.g.*, *Neal v. Clark*, 95 U.S. 704 (1887), which interprets 'fraud' to mean actual or positive fraud rather than fraud implied in law." 124 Cong. Rec. H32,399 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *see also, e.g.*, 124 Cong. Rec. S33,998 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini) (same); S. Rep. No. 95-989, at 6 (1978) ("*As with current law*, certain debts, particularly those obtained by false pretenses, false representations, or actual fraud, are excepted from discharge." (emphasis added)). In other words, it was designed to confirm that a misrepresentation must be *intended* to induce the creditor's detrimental reliance in order to fall within the scope of section 523(a)(2)(A).

There is nothing particularly unusual about that usage. The term "actual fraud" is frequently employed to convey that conduct must be intentional to give rise to whatever legal consequences attach to it. *See, e.g.*, 37 Am. Jur. 2d *Fraud & Deceit* §8 (2d ed. Westlaw database updated Nov. 2015) ("Actual fraud usually involves dishonesty of purpose or intent to deceive and, as distinguished from constructive fraud, involves the element of deceit practiced upon the party defrauded." (footnote omitted)). "False representation" is a perfect example. While false representations may be actionable even when not made with knowledge or intent, only a false representation made with intent to injure qualifies as "actual fraud." *See, e.g.*, *Faulkenberry v. Kansas City S. Ry. Co.*, 602 P.2d 203, 206 & n.8 (Okla. 1979) (whereas "[a]ctual fraud is the intentional misrepresentation or concealment of a material fact[,] ... liability for constructive fraud may be based on a negligent or even innocent misrepresentation");

Proctor Trust Co. v. Upper Valley Press, Inc., 405 A.2d 1221, 1226 (Vt. 1979) ("'Actual fraud' is deceitful misrepresentation or concealment with evil intent, while 'constructive fraud' is wrongdoing without bad faith.").[4]

Indeed, petitioner itself uses "actual fraud" in the same manner, defining it only as "intentional fraud." *See, e.g.*, Pet'r.Br.19, 24, 32,34; *see also, e.g.*, U.S.Br.12. That is certainly a correct understanding of the term, but petitioner's utter inability to define "actual fraud" by reference to anything other than the level of intent it requires reveals the fundamental flaw in petitioner's argument: The term "actual fraud" simply does not say anything one way or another about the *kind* of intentional conduct that section 523(a)(2)(A) requires. That question is instead answered by the statute's other provisions, each of which plainly requires a misrepresentation, and the

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[4] *See also, e.g.*, *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 635 (7th Cir. 2001), *as amended on denial of reh'g* (Nov. 26, 2001) ("To prove 'actual' fraud under Indiana law, the defrauded party must establish that it was injured as a result of its justifiable reliance on a material misrepresentation ... made with knowledge of its falsity and in an effort to induce reliance."); *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 346-47 (Va. 1998) (distinguishing a claim for "constructive fraud," which may be based on a false representation "made innocently or negligently" from a claim for "actual fraud," which may not); *Evans Indus. Coatings, Inc. v. Chancery Court of Union Cty.*, 870 S.W.2d 701, 703 (Ark. 1994) (defining "actual fraud" to require a misrepresentation with knowledge of falsity and intent to induce reliance); *Douglas v. Ogle*, 85 So. 243, 244 (Fla. 1920) ("'The distinguishing element of actual fraud ... is always untruth between the two parties to the transaction, so that actual fraud may be reduced to misrepresentation and concealment.'").

statute's "obtained by" clause, which plainly contemplates some word or act on which the creditor relied. *See supra* pp.25-26. Congress's inclusion of the term "actual fraud" is just the means by which it confirmed that section 523(a)(2)(A) also requires scienter.

According to petitioner, Congress had no need to impose an intent requirement on section 523(a)(2)(A) because "false pretenses" and "false representation" already required scienter. Pet'r.Br.37-38. But as explained, at common law, false representations that induced reliance could be actionable even if they were made without knowledge of the falsity. *See, e.g.*, 23 Am. Jur. *Fraud & Deceit* §127 (1939) ("one may be held liable for false representation .... even though the party making the statements does not know that they are false, but actually believes them to be true, and has no intention to deceive or defraud the other party"); Samuel Williston, *Liability for Honest Misrepresentation*, 24 Harv. L. Rev. 415, 427-28 (1911); *Derry v. Peek*, [1889] 14 App. Cas. 337. 374 (H.L.) (Lord Herschell) (explaining the difference between "fraud" and "false representation"). While some jurisdictions had rejected that view by 1978, certainly not all had. *See* Prosser, §107, at 705 ("A minority of the American courts have refused to accept *Derry v. Peek*, and have held that deceit will lie for negligent statements").

It was therefore perfectly reasonable for Congress to be concerned that courts might interpret the terms "false pretenses" and "false representation" as applying to innocent or negligent, rather than intentional, conduct. Indeed, this Court itself has

alluded (albeit in a case where the scope of those provisions was not at issue) to the possibility that the terms "false pretenses" and "false representation" in section 523(a)(2)(A) might require something less than fraudulent misrepresentation. *See Field*, 516 U.S. at 70 n.8. Surely "[i]t is no superfluity for Congress to clarify what" the text of the statute otherwise would have left "at best unclear." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 n.7 (1994). This Court has "long acknowledged that a 'sufficient' explanation for the inclusion of a clause can be 'found in the desire to remove all doubts' about the meaning of the rest of the text." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1363-64 (2015) (Scalia, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819)). That explanation is more than sufficient here.

B. Petitioner's Reading of the Statute Exacerbates Any Superfluity Concerns.

Admittedly, Congress may not have gone about the task of imposing an intent requirement on section 523(a)(2)(A) with laser-like precision. But petitioner's alternative reading of the statute creates far worse problems than an imprudent use of the word "or." After all, if petitioner were correct that Congress included the term "actual fraud" to *broaden* the universe of "frauds" to which the exception applies to include any and all conduct undertaken with "intent to defraud," then the words "false pretenses" and "false representation" are superfluous under petitioner's reading, as petitioner insists that those

terms apply only to intentionally fraudulent conduct.[5] The "canon against surplusage" thus has "considerably less force in this case," as it "'assists only where a competing interpretation gives effect to every clause and word of a statute.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). Here, the only competing interpretation petitioner has to offer exacerbates superfluity concerns.

And that is but the first of the superfluity problems that petitioner's reading would produce. In petitioner's view, by using the term "actual fraud," Congress extended section 523(a)(2)(A) to reach debts that not only are not the product of a misrepresentation on which the creditor relied, but are not for things that the debtor obtained *from the creditor*. Here, for instance, petitioner does not claim that it gave anything to *respondent*; instead, it seeks to hold respondent liable for the debt that *Chrysalis* owed petitioner for the electronic device components that Chrysalis received from petitioner.[6] Reading

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[5] Of course, those terms could still be given independent meaning by inferring from the inclusion of "actual fraud" that Congress intended them to apply *without regard* to the debtor's intent. But that would be a particularly perverse result when all signs point to the conclusion that Congress was trying to ensure that the statute would *not* reach "constructive" or "implied" fraud.

[6] In fact, petitioner's claim is even more attenuated than that, as petitioner does not even claim that *respondent* obtained any money from Chrysalis. Petitioner instead claims only that entities *controlled by* respondent obtained money from Chrysalis, and that the money *they* obtained from Chrysalis inured to respondent's benefit. The debt alleged here thus is (at least) twice removed from any money or property with which petitioner parted.

section 523(a)(2)(A) to reach such debts would be flatly inconsistent with the language confining the exception to debts "for money, property, services, or ... credit, to the extent *obtained by*" the conduct that it enumerates. 11 U.S.C. §523(a)(2) (emphasis added).

Attempting to resist that conclusion, petitioner claims it is enough to satisfy the statute's "obtained by" requirement that the debtor owes the creditor money because he used "actual fraud" to obtain something from *someone*, even if that someone was not the creditor. Pet'r.Br.39; *see also* U.S.Br.8, 17-18. But that strained reading of the text would deprive of all force Congress' decision to include the language "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" in subsection (a)(2) *and nowhere else*. Whereas the other provisions of section 523(a) are directed at debts "for" the various things that they enumerate (*e.g.*, debts "for ... embezzlement, or larceny," or "for willful and malicious injury," 11 U.S.C. §523(a)(4), (6)), subsection (a)(2) alone is confined to debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" the conduct it covers. If that language does not confine the exception to debts for money, property, services, or credit obtained *from the creditor*, then its inclusion is meaningless, as the same simple "for" that Congress used in all the other exceptions would have sufficed to "require[] causation" between the fraud and the debt. Pet'r.Br.42.

Moreover, petitioner's argument is undercut completely by the other provisions to which section 523(a)(2)'s "obtained by" requirement applies. In

addition to "actual fraud," subsection (A) also applies to "false pretenses" and "false representation." 11 U.S.C. §523(a)(2)(A). No one disputes that this conduct must be directed *at the creditor* to give rise to a debt excepted by section 523(a)(2)(A). *See Collier*, ¶523.08[1][d]. Subsection (B) reflects the same limitation: It requires a materially false writing about the debtor's financial condition "on which *the creditor* to whom the debtor is liable *for such* money, property, services, or credit reasonably *relied*." 11 U.S.C. §523(a)(2)(B)(iii) (emphasis added). And subsection (C) creates a presumption of nondischargeability when *the creditor* gave the debtor certain things within 90 or 70 days of obtaining bankruptcy relief. *Id.* §523(a)(2)(C). As these provisions underscore, section 523(a)(2) does not apply whenever the creditor can establish that the debtor directed a false word or deed at *someone*, or obtained something from *someone* through fraud. It applies only when the debtor used fraud to obtain something *from the creditor*.

"[T]he established interpretative canons of *noscitur a sociis* and *ejusdem generis*," *Wa. State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003), thus reinforce the conclusion that *all* of section 523(a)(2)—including its "actual fraud" language—applies only to debts for things obtained *from the creditor*. Subsection (C) provides a particularly strong case for "avoid[ing] ascribing to [actual fraud] a meaning so broad that it is inconsistent with its accompanying words," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), as subsection (C) is a modification *to subsection (A)*. *See id.* §523(a)(2)(C)(i) ("for purposes of subparagraph (A)..."). Moreover, reading the exception as confined

to debts for things with which the debtor fraudulently induced the creditor to part is far more consistent with "the long-standing principle that 'exceptions to discharge should be confined to those plainly expressed.'" *Bullock*, 133 S. Ct. at 1760 (quoting *Kawaauhau*, 523 U.S. at 62); *see also, e.g.*, *Local Loan*, 292 U.S. at 244; *Gleason*, 236 U.S. at 562. As each of those canons confirms, as between an exceedingly expansive reading of an exception that renders large swaths of its text irrelevant, and a reading that simply calls into question Congress' use of the word "or," the choice is clear.

C. Petitioner's Reading Also Creates Superfluity Concerns as to Other Exceptions.

Precisely because petitioner refuses to recognize the evident purpose of the exception's "obtained by" language, its boundless conception of "actual fraud" would render several other exceptions delineated in section 523(a) superfluous as well. For example, in subsection (a)(4) of the statute, Congress excepted from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. §523(a)(4). If petitioner were correct that section 523(a)(2) applies to all forms of "fraud" without regard to whether they induced the creditor to part with money, property, services, or credit, then the term "fraud" in section 523(a)(4) would be utterly redundant. Yet for more than a century, Congress has seen fit to have two *different* fraud exceptions, one relating to debts "created" or "obtained by" fraud, and another relating to debts for fraud committed in a fiduciary capacity *See, e.g.*, 1898 Act

§17a(4), 30 Stat. at 550-51. Congress retained that structure even after the Bankruptcy Commission initially encouraged it to drop "fraud" from subsection (a)(4) and include it only in subsection (a)(2). *See* H.R. Doc. No. 93-137, pt. II, at 139 n.10 (1973).

Petitioner tries to explain away that glaring redundancy problem by noting that subsection (a)(4) applies to "'fraud *or defalcation*'" by a fiduciary. Pet'r.Br.51 (emphasis added). That may explain why subsection (a)(4) *as a whole* is not superfluous, but it does nothing to explain why the provision specifically covers "fraud." Petitioner notes that subsection (a)(4) is *narrower* than its reading of subsection (a)(2)(A) because it applies only if the debtor was acting "in a fiduciary capacity." *Id.* But that just confirms that the redundancy petitioner's interpretation would produce is complete. And petitioner makes the puzzling suggestion that subsection (a)(4) is *broader* than subsection (a)(2)(A) because "some conduct may be fraudulent only if done in a fiduciary capacity." *Id.* But subsection (a)(4) applies only to *intentional* conduct, *see Bullock*, 133 S. Ct. at 1759, so anything that counts as fraud by a fiduciary would count as "actual fraud" under petitioner's "all intentional fraud" theory as well. Accordingly, under petitioner's reading, there is simply no way to reconcile Congress' inclusion of the term "actual fraud" in subsection (a)(2)(A) with its retention of the term "fraud" in subsection (a)(4).

And subsection (a)(4) is but one of multiple exceptions that refer explicitly to "fraud." Subsection (a)(19) excepts debts for violations of federal or state securities laws or "for common law fraud, deceit, or

manipulation in connection with the purchase or sale of any security." 11 U.S.C. §523(a)(19)(A). Subsection (a)(11) excepts debts "provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union." *Id.* §523(a)(11). There is no apparent explanation why these exceptions are explicitly directed at specific types of "fraud" if petitioner is right that section 523(a)(2)(A) already covers the universe of debts that stem from any form of fraudulent conduct.

The explanation for this seeming overlap is self-evident: Section 523(a)(2)(A) is directed only at debts that "follow[] a transfer of value or extension of credit induced by falsity or fraud." *Field*, 516 U.S. at 66. If the debt arises out of some other form of intentional conduct, then the creditor's recourse is to some other exception—whether it be one of the other fraud exceptions, or the catchall exception "for willful and malicious injury by the debtor to another entity or to the property of another entity," 11 U.S.C. §523(a)(6). *See infra* pp.43-44. Recognizing that the term "actual fraud" does not eliminate the need for a reliance-inducing misrepresentation, but rather simply requires that inducement to be intentional, thus not only suffices to "give effect ... to every clause and word of" section 523(a)(2)(A), *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quotation marks omitted), but also

harmonizes that exception with the ones surrounding it.

That reading is also fully consistent with this Court's decisions in *Cohen v. de la Cruz*, 523 U.S. 213 (1998), and *Archer v. Warner*, 538 U.S. 314 (2003). In fact, each of those cases reinforces the conclusion that section 523(a)(2)(A) applies only when the debtor used a misrepresentation to induce the creditor to part with something. *Cohen* concerned whether section 523(a)(2)(A) excepted from discharge a judgment awarding treble damages to tenants whom the debtor had fraudulently induced to make rent payments. The question was whether a debt excepted under section 523(a)(2)(A) must be confined to "the value of the money, property, or services received by the debtor," or can encompass the full extent of the debtor's liability for its fraudulent conduct. 523 U.S. at 219. In concluding that the statute excepts debts to the full extent of the debtor's liability, the Court did not abandon the notion that the debtor must have received *something* from the creditor for the debt to come within the scope of section 523(a)(2)A). It instead found that condition *satisfied* because the debt was the product of rent payments that the debtor "obtained [from the creditors] by fraud." *Id.* And the Bankruptcy Court's decision below confirms that the fraud involved a reliance-inducing misrepresentation. *See In re Cohen*, 185 B.R. 180, 182 (Bankr. D.N.J. 1995) (finding "that ... the Debtor made a misrepresentation regarding the amount of rent" on which the tenants reasonably relied).

Petitioner's reliance on *Archer* is, if anything, more misplaced. The question in *Archer* was whether

section 523(a)(2)(A) excepts a "debt embodied in a settlement agreement that settled a creditor's earlier claim 'for money ... obtained by ... fraud'" (specifically, money that the debtors obtained by allegedly using fraud to induce the creditor to purchase their company for more than its value). 538 U.S. at 316. In concluding that it does, the Court reasoned that even though the debt had been reduced to a settlement agreement, the bankruptcy court was still obligated to determine whether the debt *underlying* that agreement was "a debt for *money obtained by fraud*." *Id.* at 319. If so, then the debt was excepted notwithstanding the "form" in which it was presented. *Id.* at 319, 321. Thus, far from departing from the rule that section 523(a)(2) requires a misrepresentation that induced the creditor to part with whatever it is that gave rise to the debt, *Archer* reiterates the obligation of courts to engage in "the fullest possible inquiry" to determine whether that is the case. *Id.* at 321.

Indeed, petitioner does not identify a single case in which this Court has accepted the notion that section 523(a)(2)(A) applies to debts that do not originate with a misrepresentation made to the creditor—let alone debts that do not involve *any* money, property, services, or credit obtained from the creditor. Instead, from *Field* all the way down the line, this Court has consistently recognized that section 523(a)(2)(A) applies only when the creditor establishes that the debtor made some misrepresentation that induced the creditor to part with whatever it was that gave rise to the debt. In short, "some degree of reliance is required to satisfy the element of causation inherent in the phrase

'obtained by.'" *Field*, 516 U.S. at 66. And a creditor can establish that reliance only by establishing a misrepresentation.

III. The Term "Actual Fraud" Does Not Import Fraudulent Conveyance Law Into Section 523(a)(2)(A) *Sub Silentio*.

Ultimately, even petitioner seems to recognize that defining "actual fraud" as "intentional fraud" does not advance its cause. Petitioner thus shifts to the argument that, whatever "actual fraud" may be, it must include participation in a conveyance intended to "hinder creditors' rights." Pet'r.Br.15; *see also* U.S.Br.21, 27 But the text of section 523(a)(2)(A) confirms that it does not apply to so-called "fraudulent conveyances," and there are ready explanations for why that is so. At any rate, the cases on which petitioner relies do not establish that fraudulent conveyances are a subset of "actual fraud." Instead, they demonstrate only that the term "actual fraud" is sometimes used to describe the *intent* necessary to avoid a conveyance that injures a creditor. In other words, they simply reinforce the conclusion that "actual fraud" is a term used to denote intent, not to define what conduct qualifies as fraud.

A. Neither the Making Nor the Receipt of Fraudulent Conveyance Is Covered by Section 523(a)(2)(A).

Petitioner spills much ink trying to establish the proposition that fraudulent conveyances are a form of fraud. But the question is academic, as fraudulent conveyances are plainly not a form of fraud that falls within the scope of section 523(a)(2)(A). As explained, section 523(a)(2)(A) is confined to debts that "follow[]

a transfer of value or extension of credit *induced by* falsity or fraud." *Field*, 516 U.S. at 66 (emphasis added). While a fraudulent conveyance certainly may injure a creditor, it does not do so by inducing the creditor to part with anything giving rise to a new debt. Instead, it does so by interfering with the creditor's ability to collect on a debt that *already exists*. Accordingly, whether it is intended to injure a creditor or not, a fraudulent conveyance simply does not give rise to the kind of debt that section 523(a)(2)(A) excepts from discharge.

Of course, that does not mean that a creditor injured by a fraudulent conveyance is without recourse. First, the Bankruptcy Code has long provided remedies against debtors who transfer their *own* assets in ways that injure their creditors. Such transfers are avoidable, and serve as grounds for denying a discharge of all debts if made with actual intent to injure a creditor. Under section 727(a)(2), a debtor may be denied a discharge if, within one year before filing for bankruptcy or at any time after, the debtor transferred any of his assets "with intent to hinder, delay, or defraud a creditor." 11 U.S.C. §727(a)(2). If a debtor transfers his assets in the *two* years before filing "with actual intent to hinder, delay, or defraud" a creditor, then the trustee may avoid the transfer. *Id.* §548(a)(1)(A). Finally, the trustee may also avoid such conveyances without regard to the debtor's intent if they were made for "less than a reasonably equivalent value" and at least one of four other conditions is satisfied. *Id.* §548(a)(1)(B). Accordingly, there is no need to have an *exception* for debts arising out of fraudulent transfers of the debtor's

own assets because the code separately deals with that conduct expressly.[7]

That leaves the question of the kind of conduct alleged (albeit not proven) in this case—namely, debts attributable to a debtor's participation in a transfer by some *other* debtor, in an alleged attempt to injure *that* debtor's creditors. In other words, it leaves the question of debtors who, before filing for bankruptcy, were the knowing recipient of someone else's fraudulent transfer. But there is no need to try to cram knowing *receipt* of a fraudulent transfer into section 523(a)(2)(A) either because the code already has a provision broad enough to encompass that conduct as well. Indeed, for more than a century, the code has contained an exception for intentional wrongdoing that injures a creditor, but not by inducing it to part with money, property, services, or credit. It excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. §523(a)(6).

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[7] Petitioner's *amici* suggest that these remedies are insufficient because they apply only to transactions made within one or two years of filing for bankruptcy (or, for purposes of section 548(a), when authorized by state law). *See, e.g.*, U.S.Br.20, 27-28 n.7; Nat'l Ass'n of Bankr. Trustees *Amicus* Br.11-13. But those temporal limits are not some inadvertent defect in the code; they are the manifestation of Congress' considered judgment as to when a transaction is most likely to be animated by intent to hinder, delay, or defraud a creditor. Accordingly, it hardly helps petitioner's cause to claim, as its *amici* do, that reading section 523(a)(2)(A) broadly would allow creditors to except from discharge debts attributable to transactions arising *outside* the two-year timeframe Congress selected.

Unlike section 523(a)(2), that provision is not confined to debts "for money, property, services, or ... credit ... obtained by" such conduct; it instead applies to *any* debt "for willful and malicious injury." *Id.* Section 523(a)(6) thus supplies a "far more direct avenue for dealing with a" claim that a debtor should be held responsible for *someone else*'s debt because it knowingly accepted a transfer designed to hinder *someone else*'s creditors. *McClellan*, 217 F.3d at 896 (Ripple, J., concurring); *see also, e.g.*, *In re Bammer*, 131 F.3d 788, 790-93 (9th Cir. 1997); *In re Jennings*, 670 F.3d 1329, 1334 (11th Cir. 2012). The level of intent required under section 523(a)(6) poses no obstacle to invoking that provision in appropriate circumstances, as making or receiving a transfer with intent to delay, hinder, or defraud a creditor has long been considered "malicious" conduct. *See, e.g.*, Orlando F Bump, *Fraudulent Conveyances: A Treatise Upon Conveyances Made by Debtors to Defraud Creditors* 22 (3d ed. 1882) ("Every contrivance ... to the intent to delay, hinder or defraud creditors is malicious.").[8]

Petitioner's appeals to "the Bankruptcy Code's 'basic policy' of 'affording relief only to an honest but unfortunate debtor,'" Pet'r.Br.44 (quoting *Cohen*, 523 U.S. at 217), are therefore entirely misplaced. The question here is not whether Congress was concerned

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[8] *See also, e.g.*, *Hafner v. Irwin*, 23 N.C. 490, 498 (1841) ("[e]very contrivance to the intent to hinder creditors—directed to that end—is 'malicious'"); *Baldwin v. Peet, Sims & Co.*, 22 Tex. 708, 715 (1859) ("[a] failing debtor has not a right to maliciously, covinously, etc., execute a deed with intent to hinder, delay, or defraud his creditors").

with debts attributable to conduct undertaken with deliberate intent to injure a creditor. As several provisions of the code reflect, Congress undoubtedly was. The question here is whether section 523(a)(2) is the home for every debt in any sense attributable to any conduct that conceivably might be described as "fraudulent." It is not. Section 523(a) has many exceptions, of which subsection (a)(2) is but one. That exception should not be expanded at the expense of another (or, more aptly, several others) just because the debtor is accused of having acted "dishonestly."

That does not mean that the question of *which* exception covers a particular type of debt is without consequence. It matters a great deal in the Chapter 13 context, where section 523(a)(2) applies but section 523(a)(6) does not. That is not an oversight. It is a reflection of Congress' decision to make "[a] discharge under Chapter 13 ... 'broader than the discharge received in any other chapter,'" *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 268 (2010), in hopes of incentivizing debtors to see their Chapter 13 plans through to completion, *see, e.g.*, H.R. Rep. No. 95-595, at 129 (1977) ("The fact that a discharge would not be available in a [Chapter 7] case should furnish a greater incentive for the debtor to perform under the [Chapter 13] plan."). Allowing creditors to smuggle section 523(a)(6) claims into section 523(a)(2)(A) thus would undermine Congress' efforts to encourage debtors to use a process under which more creditors are actually likely to be paid.

In sum, Congress made a conscious decision to except different kinds of debts in different places, and that decision must be respected. Expanding the scope

of an exception based on vague conceptions of "basic policy" not only can have unintended consequences, but also is inconsistent with elementary principles of statutory construction. *See, e.g.*, *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address"). That is precisely why this Court has repeatedly reaffirmed "the long-standing principle that 'exceptions to discharge should be confined to those plainly expressed.'" *Bullock*, 133 S. Ct. at 1760 (quoting *Kawaauhau*, 523 U.S. at 62); *see also, e.g.*, *Local Loan*, 292 U.S. at 244; *Gleason*, 236 U.S. at 562.

B. Fraudulent Conveyance Cases Only Underscore that "Actual Fraud" Is a Term of Intent.

At any rate, petitioner's extended detour into the history of fraudulent conveyance law is not only irrelevant, but counterproductive. The cases petitioner invokes reinforce the conclusion that "actual fraud" is a term used to differentiate between intentional and negligent or innocent conduct, not a catchall used to denote every form of conduct that conceivably might be described as fraud. Indeed, *Neal v. Clark*, the principal fraudulent conveyance case on which petitioner relies, does not hold that fraudulent conveyance is a subset of "actual fraud." Instead, it simply uses the term "actual fraud" to distinguish conveyances "involving moral turpitude or intentional wrong" from those involving "implied fraud, or fraud

in law, which may exist without the imputation of bad faith or immorality." *Neal*, 95 U.S. at 709.

Petitioner makes much of the fact that *Neal* drew that distinction in a case involving a claim that a debt attributable to the receipt of a purportedly fraudulent conveyance was excepted from discharge under the 1867 Act's exception for debts "created by ... fraud." From there, petitioner would have the Court infer that Congress' inclusion of the term "actual fraud" was intended not to incorporate *Neal*'s *holding*, but as an indirect way of signaling Congress' desire to expand section 523(a)(2)(A) to reach any debt analogous to the debt alleged in *Neal*. *See* Pet'r.Br.21-22. That argument might fare better if *Neal* had held, as petitioner suggests, that the recipient *would* have owed a debt excepted from discharge had he accepted the conveyance with intent to injure the creditor. But the only thing the Court held in *Neal* was that "the debt or claim asserted against Neal was *not* 'created by the fraud ... of the bankrupt'" because it did not involve "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong." 95 U.S. at 709 (emphasis added). The Court said nothing one way or another about whether there *would* have been a debt "created by the fraud ... of the bankrupt"—let alone a debt "for money, property, services, or ... credit ... obtained by ... actual fraud," 11 U.S.C. §523(a)(2)(A)—had Neal acted with scienter.

Neal thus establishes nothing more than that "actual fraud" means "positive fraud." *Neal*, 95 U.S. at 709. And the legislative history confirms that the only thing Congress intended section 523(a)(2)(A) to "codify" was *Neal*'s holding "interpret[ing] 'fraud' to

mean actual or positive fraud rather than fraud implied in law." 124 Cong. Rec. H32,399 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *see also, e.g.*, 124 Cong. Rec. S33,998 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini) (same). That is hardly surprising, as what petitioner hypothesizes would have been an exceedingly roundabout means of trying to ensure that debts like the one alleged (but not proven) in *Neal* were excepted from discharge.

Indeed, it is difficult to conceive of a more convoluted way to establish an exception for debts attributable to the knowing receipt of a fraudulent conveyance than dropping a phrase used to describe the *intent* element of some fraudulent conveyance laws into the middle of the lone exception confined to debts "for money, property, services, or ... credit ... obtained by" particular *conduct*, and hoping that savvy readers would catch the sly cross-reference to the allegations (not the holding) of *Neal*. The far more simplistic way to achieve that end would have been to add an exception for debts "for fraudulent conveyance." Moreover, if fraudulent conveyances were really Congress' concern, it certainly would have made more sense to employ the phrase "hinder, delay, or defraud a creditor"—the phrase that Congress has used in the fraudulent conveyance context for nearly 150 years, and borrowed from laws dating back even further than that. *See* 1867 Act §35, 14 Stat. at 534; *BFP*, 511 U.S. at 540. In all events, Congress had no need to do any of that in 1978 because section 523(a)(6) was already broad enough to cover debts attributable to the knowing receipt of an intentionally fraudulent conveyance.

The other fraudulent conveyance cases on which petitioner relies are no more helpful to its position than *Neal*. Each case likewise uses the term "actual fraud" to describe an intent element, not to describe the broader category of tort law to which fraudulent conveyance belongs. For instance, *Coder v. Arts*, 213 U.S. 223 (1909), concerned the precursor to section 548 in the 1898 Act, which allowed the trustee to avoid any transfer made by a debtor within four months of filing for bankruptcy "with the intent and purpose on his part to hinder, delay, or defraud his creditors." 1898 Act §67e, 30 Stat. at 564. The question before the Court was whether that intent element had to be proven, or whether a debtor could be "presumed to have intended such consequences" whenever a transfer was made within four months of the petition. 213 U.S. at 241. The Court used the term "actual fraud" only in the context of explaining "[w]hat is meant" by the phrase "intent on the bankrupt's part to hinder, delay, or defraud creditors," concluding that the intent required by that phrase is synonymous with the intent required by "actual fraud." *Id.* at 242.

Bean v. Smith, 2 F. Cas. 1143 (D.R.I. 1821) (Story, J.), used the phrase "actual fraud" to the same effect. That case concerned an effort to avoid transactions under Rhode Island's fraudulent conveyance statute. In determining whether the transactions should be "'utterly void'" as against injured creditors, but the purchaser might still be given some equitable relief, Justice Story (riding circuit) concluded that the answer turned on whether the conveyance was received with "inten[t] to injure" the debtors' creditors, or was just "obtained under suspicious or inequitable circumstances." *Id.* at 1159. And he described that as

commensurate with the "distinction between actual and presumed fraud." *Id.* The other bankruptcy cases on which petitioner relies likewise use the phrase "actual fraud" in the context of identifying the proof necessary to establish "intent to hinder or delay" a creditor when trying to avoid a transfer, not of determining whether a debt was "created" or "obtained" by "fraud." *See* Pet'r.Br.28-31 (citing cases holding that intent required by "proof of intent to hinder or delay" is equivalent to the intent required by "actual fraud").

Just as in other contexts, then, in the fraudulent conveyance context the term "actual fraud" speaks to the intent with which conduct must be undertaken, not to what kind of conduct qualifies as "fraud." The Uniform Law Commission recently emphasized precisely that point in renaming the erstwhile "Uniform Fraudulent Transfer Act" the "Uniform Voidable Transactions Act." *See* Unif. Voidable Transactions Act ("UVTA") §15 & cmt. 1 (Unif. Law Comm'n 2014). As the Commission explained, the frequent use of the terms "actual fraud" and "constructive fraud" in this area of law can be "highly misleading" because "a transaction need not bear any resemblance to common-law fraud" to be voidable. *Id.* §4, cmt. 8; *see also id.* §15, cmt. 1 ("the word 'Fraudulent' in the original title, though sanctioned by historical usage, was a misleading description of the Act as it was originally written" because "[f]raud is not, and never has been, a necessary element of a claim for relief under the Act").

That is so even under the provision of the UVTA that requires intent to hinder, delay, or defraud

creditors. As the Commission explained, "'[h]inder, delay, or defraud' is best considered to be a single term of art describing a transaction that unacceptably contravenes norms of creditors' rights," not a transaction that has "a necessary element" some sort of "fraud." *Id.* §4, cmt. 8. The Commission thus not only found the term "constructive fraud" "oxymoronic and confusing," but also found "the shorthand tag 'actual fraud' .... misleading" in this context because the phrase intent to "hinder, delay, or defraud" "does not in fact require proof of fraudulent intent." *Id.* §14, cmt. 1. The Commission therefore excised the term "fraud" from the UVTA entirely, and concluded that doing so did not alter the scope of the Act one bit.

Section 871 of the Restatement (Second) of Torts also underscores the distinction between an *avoidable* transaction and a *fraudulent* one. In its discussion of the tort of "intentional harm to a property interest," the Restatement provides as an example of that tort a claim that "title to land has been obtained by fraud." Restatement (Second) of Torts §871 cmt. a. Section 871 goes on to explain that "[t]he actor's conduct is fraudulent if he intentionally causes another to act or refrain from acting by means of intentionally false or misleading conduct or by his intentional concealment of facts or by his intentional failure to disclose a fact that he has a duty to reveal to the other." *Id.* §871 cmt. e. And section 871 provides as an example of an intentional harm to a property interest attributable to "fraud" a situation in which "one misrepresents to another the financial ability of himself or of a third person, as a result of which the other transfers property." *Id.* Section 871 thus reinforces the conclusion that, even if the term "fraud" may be used

in both contexts, there is a fundamental difference between a conveyance intended to "hinder, delay, or defraud," and a conveyance attributable to "fraud."[9]

As both section 871 and the recent revisions to the UVTA underscore, regardless of whether fraudulent conveyances qualify as a form of fraud in the abstract, they are simply not the same thing as common-law fraud. That tort instead has as its elements, *inter alia*, a misrepresentation that injured the victim by inducing its reliance. And that tort is the only one that falls within the scope of section 523(a)(2)(A)'s exception "for money, property, services, or an extension, renewal, or refinancing of credit ... obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. §523(a)(2)(A). That is not to say that a creditor injured by the knowing receipt of a conveyance intended to interfere with its ability to collect on a debt is without recourse. Its recourse just is not to section 523(a)(2)(A).

C. Petitioner's Failure to Demonstrate a Debt Excepted from Discharge Is the Product of an Evidentiary Failing.

The notion that debts attributable to knowing receipt of an intentionally fraudulent conveyance belong in section 523(a)(6) should come as no surprise

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[9] The First Circuit made the perplexing argument that section 871 of the Restatement somehow supports the interpretation of section 523(a)(2)(A) that petitioner advances here. *See In re Lawson*, 791 F.3d 214, 219 (1st Cir. 2015). In fact, it does just the opposite. By treating a property transaction as the product of "fraud" only when it involves a misrepresentation, section 871 confirms that transactions are not necessarily "fraudulent" in the true sense merely because they intentionally injure a creditor.

to petitioner. Petitioner invoked section 523(a)(6) in this very case. Its efforts to do so did not fail because the lower courts concluded that the conduct petitioner alleged could not give rise, as a matter of law, to a debt excepted from discharge under section 523(a)(6). They failed because the courts below found that even if respondent caused Chrysalis to make transfers for less than reasonably equivalent value (a finding that respondent challenged in every court below, but the Fifth Circuit had no need to address), there was "scant evidence in the record that Ritz made the[] transfers *with the intent to harm Husky*." Pet.App.18a (emphasis added); *see also* Pet.App.75a-76a (affirming Bankruptcy Court's finding that the record was "'wholly devoid of any proof that [respondent] willfully and maliciously injured Husky or Husky's property'" (quoting Pet.App.96a)). Petitioner's inability to establish the existence of a debt excepted from discharge thus is a product not of some deficiency in the Bankruptcy Code, but of petitioner's failure to prove that respondent actually did it any intentional harm.

That not only explains why petitioner's section 523(a)(6) argument failed. It also confirms that the Court should affirm no matter how it resolves the question presented, as petitioner failed to prove that any wrongdoing on respondent's part was intended to "hinder, delay, or defraud" petitioner. To be sure, the courts below made their intent findings in the context of rejecting petitioner's section 523(a)(6) claim rather than its section 523(a)(2) claim. But the courts did not employ some unusually stringent intent standard in doing so. They instead asked only whether respondent acted with either "'objective substantial certainty of

harm or a subjective motive to cause harm.'" Pet.App.17a (quoting *Miller v. J.D. Abrams, Inc.*, 156 F.3d 598, 606 (5th Cir. 1998)). Surely petitioner cannot mean to suggest that anything less would suffice to establish "actual fraud." *Cf. Kawaauhau*, 523 U.S. at 61-62 (noting that the phrase "willful and malicious" "triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts").[10]

Indeed, petitioner does not attempt to identify any daylight between the standard that the courts below applied to its section 523(a)(6) claim and the intent required to demonstrate "actual fraud."[11] Instead, petitioner merely appears to fight the lower courts' factual findings on its section 523(a)(6) claim,

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[10] The government alludes to a circuit split on whether section 523(a)(6) requires *subjective* intent to injure, or whether "objective substantial certainty of harm" will suffice. *See* U.S.Br.28-29 n.8. To the extent that circuit split exists, *but see Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 324 (7th Cir. 2012), it has no bearing on whether section 523(a)(6) covers debts attributable to "actual fraud," as it suggests only that the "willful and malicious" standard may be more *lenient* than the standard for proving "actual fraud." And that potential split certainly does not help petitioner, as the courts below applied the (arguably) more lenient "objective substantial certainty" in rejecting petitioner's section 523(a)(6) claim. *See* Pet.App.17a.

[11] In its certiorari-stage reply brief, petitioner suggested that "actual fraud" requires only intent to benefit oneself, not intent to do harm to another. *See* Cert.Reply.4. Petitioner does not repeat that contention in its opening brief—and with good reason, as it is flatly inconsistent with the reality that fraudulent conveyance cases use "actual fraud" as a shorthand for "intent to hinder, delay, or defraud a creditor." *See supra* Part III.B. By its terms, that standard demands a showing of intent to injure the creditor, not just intent to benefit oneself.

suggesting that they are irreconcilable with the Bankruptcy Court's finding that respondent "drained substantial funds out of Chrysalis[]," Pet.App.98a. *See* Pet'r.Br.7-8 & n.3. But even setting aside the rule that this Court does not ordinarily review factual findings accepted by two courts—let alone three—*see, e.g.*, *United States v. Ceccolini*, 435 U.S. 268, 273 (1978), petitioner made the exact same argument below, to no avail. As the Fifth Circuit explained in rejecting it, *see* Pet.App.18a, even assuming petitioner did cause Chrysalis to make transfers for less than reasonably equivalent value, that alone would not suffice to prove that he did so *with intent to injure respondent*. Instead, petitioner needed to put on some actual evidence to substantiate its claim of intent to cause injury, which petitioner utterly failed to do. *See* Pet.App.18a. Accordingly, at most, petitioner proved only a form of "constructive fraud," which even petitioner concedes is insufficient to qualify as "actual fraud" under section 523(a)(2)(A).

But ultimately, the intent question is beside the point because petitioner's section 523(a)(2)(A) claim fails for a more basic reason: Respondent neither made any misrepresentation to petitioner nor induced petitioner to part with anything. Accordingly, even if petitioner could conjure some evidence to support its effort to impute *Chrysalis*'s debt to respondent, petitioner still could not establish any debt "for money, property, services, or an extension, renewal, or refinancing of credit ... obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. §523(a)(2)(A).

CONCLUSION

The Court should affirm the decision below

Respectfully submitted,

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